

Halliburton Energy Servs., Inc., 688 F. Supp. 2d 556, 560 (N.D. Tex. 2010) (quoting *Glover v. IBP, Inc.*, 334 F.3d 471, 473-74 (5th Cir. 2003)). Indeed, “[t]he standard of review for arbitration awards has been described as ‘among the narrowest known to the law.’” *Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 726 (N.D. Tex. 1997) (quoting *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995)). A court may not vacate the arbitrator’s award except to the extent it was procured by fraud or when the arbitrator was guilty of corruption or misconduct or exceeded the scope of her powers. *See* 9 U.S.C. § 10; *Citigroup Global Mkts., Inc.*, 562 F. 3d at 358 (citing *Burchell v. Marsh*, 58 U.S. 344, 349 (1854)). Collister is asking this Court to view the arbitration as a “prologue to prolonged litigation,” which the case law makes clear is not proper. *See Choice Hotels Intern. v. SM Prop. Mgmt.*, 519 F.3d 200, 212 (4th Cir. 2008).

II. COLLISTER ILLEGALLY RECORDED AN ATTORNEY-CLIENT PRIVILEGED CONVERSATION

Collister made over 70 secret recordings in the workplace in Texas. Texas is a “one party” consent state, meaning that if Collister was a party to the conversation, he could record it. Some of his recordings capture conversations of coworkers where it does not appear that he was a party. But with respect to the one at issue in his motion, it is undisputed that he was not a party to the conversation.

Specifically, KXAN’s General Manager, Eric Lassberg, and News Director, Chad Cross, were seeking legal advice from outside counsel (the undersigned) and Nexstar’s Associate Counsel and SVP Human Resources, Terri Bush. Mr. Lassberg was speaking with Mr. Davis and Ms. Bush on a speaker phone in Mr. Lassberg’s office and the door was closed. Unbeknownst to the parties to this conversation, Collister was outside the door with his secret recorder running. When Defendants learned that Collister was going to offer this recording into evidence in the arbitration, counsel sent a cease and desist letter explaining how (1) making the recording was

illegal, and (2) attempting to use the recording was yet another violation of the Texas Penal Code. (Exhibit A).

Moreover, what was said in an attorney-client privileged conversation was not material to the fundamental elements of Collister's claims in the arbitration. Collister testified for three- and one-half days of a five-day arbitration. He admitted away most of the elements of his claims, and was not credible on others. His inappropriate behavior during the arbitration such as sleeping in the back of the conference room while witnesses were testifying and chewing on a fishing lure to distract counsel during cross examination likely hurt his credibility.

Although the Arbitrator did not need to consider what was said in the attorney-client privileged conversation, she did. Specifically, there were two pieces of evidence offered by Collister: (1) The illegal recording Collister made of an attorney-client privileged conversation; and (2) an exhibit containing statements Collister typed from either his recollection of overhearing the conversation or from listening to the illegal recording. The arbitrator admitted into evidence the document but would not admit the recording. The following was the discussion on the record:

Evidentiary Hearing Vol. 2, (Pages 206:18 to 216:9)

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- 18 You sat down in the lobby. You had turned on
19 your recorder thinking that you were going to have an
20 opportunity to meet with Mr. Lassberg?
21 A My intention was to record the conversation
22 with Mr. Lassberg, just as I had been doing for weeks,
23 months with all of the management.
24 Q But you also described a conversation that you

25 overhead. I think you described it, loud as a Led

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1 Zeplin concert?

2 A Yes, it was.

3 Q You identified that you heard Mr. Cross,

4 Mr. Lassberg, and Mr. Davis?

5 A Yes. I did not hear Ms. Bush.

6 Q You subsequently discovered, is it true, that

7 that conversation on speakerphone was picked up by your

8 phone?

9 A At the time I did not realize it because it

10 was deep inside my jacket. In fact, I didn't believe

11 that it would pick it up. It's just an iPhone. It is

12 like an iPhone 5 or something.

13 So I immediately, when I realized that

14 they were colluding to fire me, I could hear it, I took

15 my phone out, opened up my notes and started to write

16 what was being said as quickly as I could, because I was

17 under no impression that it could be picked up, or that

18 it was being picked up.

19 It wasn't until this summer when we were

20 going through the audio tracks and I was logging the

21 soundbite with Mr. Lassberg, that I listened to it and

22 realized that you could hear them talking about setting

23 me up to be fired.

24 And accusing me of being unethical, when

25 I wasn't. And strategizing how to fire me and not make

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1 it look like it was retaliation for ADHD or the

2 arbitration.

3 Q Was there one particular portion of the

4 recording that you identified for the purposes of

5 today's arbitration?

6 A I believe there were two.

7 MR. SANCHEZ: Your Honor, I know Mr. Davis

8 has an objection, should probably take it up.

9 But at this point I would like to prep to play

10 that soundbite.

11 MR. DAVIS: It doesn't matter what his

12 original intent was. Once he turned on the

13 recorder, once he realizes he is not a party to

14 this conversation and he is recording when he

15 is not a party, it is illegal.

16 It is a crime to record it. It is a crime

17 to transmit it. And it's a crime to use it.

18 There has already been two violations of

19 the Texas Penal Code. We are trying to prevent

20 another one here.

21 Counsel knows this is unethical to do
22 this. I raised it in the deposition that
23 Mr. Collister indicated that he didn't have
24 that recorded.

25 We first learned that that was actually
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1 recorded last week, when counsel designates a
2 portion of the recording.

3 And we provided the Arbitrator with case
4 law that makes it crystal clear. Mr. Collister
5 was not a party to this conversation. It was
6 illegal. And it is not admissible.

7 MR. SANCHEZ: Your Honor, this issue came
8 up on June 26th, 2018, during Mr. Collister's
9 deposition. Mr. Davis asked Mr. Collister
10 about his recordings.

11 And as you have seen in the course of this
12 arbitration, he was as transparent as the day
13 is blue outside. He was very clear, the
14 recitation you heard today is what he explained
15 to Mr. Davis in his deposition under oath as it
16 happened.

17 Mr. Davis said nothing about it, other
18 than to ask questions about it. Until this

19 morning, I think, I received a Cease and Desist
20 letter with a threat for going to the FBI, or
21 filing suits, or whatever he said. I haven't
22 actually read the letter.

23 MR. DAVIS: That's not what I said.

24 MR. SANCHEZ: I will produce it to you so
25 you can read it for yourself. I noticed he

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1 didn't copy the AAA that you received a copy of
2 the letter. So I will be sure to forward it to
3 you.

4 But since June 26th, we went through July,
5 August, September, October, I never heard a
6 word from Mr. Davis. I really didn't hear much
7 from him about anything. But I certainly
8 didn't hear about this recording, which he knew
9 about and he has known about.

10 In fact, yesterday, Your Honor, you asked
11 the question, Is there any the briefing. I
12 thought the same thing.

13 If someone has an issue that implicates
14 the penal code and all sorts of other potential
15 violations, you would think that a diligent
16 lawyer would raise that issue and file some

17 sort of Motion in limine to keep it out. That
18 wasn't done.

19 Your Honor, we held a telephone conference
20 with you last week, in which the issue of the
21 recordings was raised and discussed. And I
22 don't think Mr. Davis made that particular one.

23 If I remember correctly, I think it was
24 Mr. David Scott who appeared. And Mr. Scott
25 asked, I want a copy -- If it was him, asked, I

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1 want a copy and a breakdown of the recordings
2 that we intend to use.

3 This particular -- not this particular.
4 All the recordings have been designated by me
5 and Mr. Collister since, I think May, May or
6 June, when we identified the existence of those
7 recordings.

8 So after conferring with you, Your Honor,
9 you directed us to, Produce a list of the
10 snippets you intend to use with the date stamp
11 and the timestamp, which we have done.

12 The particular snippets was included at
13 the request of counsel in the summary. So here
14 we are on the second day of the arbitration,

15 and there's a delayed and dilatory objection to
16 recordings that they have been in possession of
17 for months.

18 Now, I strongly disagree with Mr. Davis'
19 intention that this was intentional.
20 Mr. Collister just stated he had no intention
21 of recording, didn't know that the recording
22 was picking up the conversation. He was there
23 to have a conversation with Mr. Lassberg, which
24 he was requested to attend in that office
25 conference.

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1 So I think the recordings, whether
2 Mr. Davis thinks there is an issue, they are
3 admissible. Just because there is an issue
4 regarding whether or not he thinks
5 Mr. Collister was present or not present, or a
6 party, they are otherwise admissible.

7 And let me get back to the opening
8 comments Mr. Davis made yesterday, which is, we
9 are in an arbitration. He made it a point to
10 request that you remind and direct the parties
11 that this is private. It is confidential. It
12 is not public. And I agreed.

13 I said, Your Honor, I'll abide by your
14 ruling, but nothing that was said here today or
15 in the course of this arbitration will be
16 repeated.

17 You know, it is a two-way street. If you
18 want secrecy and privacy, then you get it.

19 That's what's afforded.

20 So what is the prejudice, other than
21 Mr. Davis making collusive statements that
22 don't reflect well on him about what they are
23 going to do to Mr. Collister.

24 What is the prejudice? It all stays here
25 in this conference room.

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1 ARBITRATOR STONE: Are we talking about
2 two sentences?

3 MR. SANCHEZ: Yes, Your Honor.

4 ARBITRATOR STONE: Do you have that
5 listing?

6 MR. DAVIS: I need it. Was that --

7 MR. SANCHEZ: What we sent --

8 ARBITRATOR STONE: Does this help you?

9 MR. DAVIS: Yeah. I mean, we are still
10 going to object. There was a discussion in a

11 break, while fighting through a lot of other --
12 Mr. Collister's shenanigans during his
13 deposition and inappropriate behavior where I
14 made it very clear, this is an illegal
15 recording.

16 Ms. Bush was there. I don't recall if she
17 chimed in, but it was an illegal recording. We
18 made our position very clear.

19 To-date I have gotten zero cooperation on
20 reigning in Mr. Collister's behavior. He has
21 not addressed the fact that Mr. Collister was
22 not a party to that conversation. There is no
23 dispute that he wasn't a party.

24 It doesn't matter if he placed a device in
25 the room, outside the room, down the hall, he

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1 was not a party to that conversation. And it
2 is illegal.

3 You know, I think if -- even if that quote
4 comes in, I think it is prejudicial. I don't
5 know if it would completely cure the prejudice.

6 But if we could amend our answer to
7 include a defense of after-acquired evidence
8 saying that per his contract, he can be

9 terminated for an illegal act, it might help.

10 But I don't think it would cure the

11 prejudice. And I don't think it would get past

12 the very clear case law that says it is not

13 admissible.

14 MR. SANCHEZ: If I could respond?

15 ARBITRATOR STONE: Sure.

16 MR. SANCHEZ: I do, for once, agree

17 whole-heartly with Mr. Davis on one point.

18 That is, it is prejudicial. It is very

19 prejudicial. It is prejudicial to Mr. Davis in

20 what he was trying to do.

21 And the fact that Mr. Collister was still

22 an employee, and this management was

23 ostensibly supposed to be working with him to

24 remediate his position, and they are not doing

25 that.

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1 This is all for your eyes to make him look

2 bad. So he can sit there and refer to his

3 shenanigans and whatnot. It is just a

4 continuing pattern.

5 Let's talk about what actually happened.

6 There's a lot of lawyers in this room. And I

7 can tell you one thing that I don't do when I
8 speak to my clients, I certainly don't say, Put
9 me on speakerphone with a roomful of people --

10 ARBITRATOR STONE: We are going to stop
11 right there, because we don't need to. These
12 two sentences are not going to change my mind
13 in your favor or in yours.

14 Under the circumstances, I think it's
15 safer for all involved that this not come in,
16 because there is a big question about whether
17 it was legally recorded. So this will not come
18 in.

19 And I can tell you, in all honesty, it is
20 not a nonissue because it will not change my
21 mind one way or the other.

22 There's a lot here, and I'm going to make
23 my mind up on a lot here, but I don't need
24 this.

25 MR. DAVIS: I think that's fair. I think

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1 you would instruct a jury on what the lawyer's
2 say is not evidence and doesn't matter. I
3 think that's a fair assessment --

4 ARBITRATOR STONE: It is not going to

5 favor you, and it is not going to favor you.

6 It is a neutral. So let's move on.

7 MR. DAVIS: Fair enough, Judge.

8 MR. SANCHEZ: Thank you, Your Honor.

9 Thank you for listening to us.

Even though the recording itself was not admitted into evidence, an exhibit purportedly quoting from either Collister's recollection from eavesdropping or his listening to the illegal recording was admitted into evidence. Specifically, Exhibit 43 is a Performance Improvement Plan Progress Update KXAN gave Collister outlining things he needed to do remain employed. Instead of simply working on doing those things like meeting important deadlines to get stories on the air for the Super Bowl and Olympics, Collister wrote back a long-winded diatribe refusing to commit to deadlines. He typed in bold red and underlined type –

“*Direct quotes from KXAN's attorney to GM Eric Lassberg and ND Chad Cross, “What you're looking for are performance issues with no connection to ADHD, this is our biggest opportunity” and “Everything from here on is for the arbitrator who can think – wow this guy is unreasonable.”**

So, despite the ruling on the admissibility of the recording, the Arbitrator admitted into evidence what Collister claims is at issue in this motion.

What Collister wants to do in this Court is re-litigate the significance of what he quoted to the Arbitrator. As the arbitrator stated on the record, it did not favor either side. Collister disagrees. But that is not for the Court to decide in reviewing an arbitration award. Even if the Court was inclined to conduct such a review, there is plenty of evidence showing that there were performance issues with no connection to Collister's alleged disability (ADHD) and that the Arbitrator could think “wow this guy is unreasonable.”

At issue in the arbitration was whether Collister's requests for accommodation were reasonable and whether he needed them to perform his job, or whether he was being

unreasonable and trying to get fired so he could sue and get out of his non-compete agreement and work for a competitor. It was undisputed that no doctor, psychiatrist, psychologist, counselor, or other healthcare provider recommended the accommodations requested by Collister. The doctor who diagnosed the ADHD politely refused to sign off on Collister's list of accommodations. He then saw a counsellor, secretly recording the sessions, but could not get her to sign off on the accommodations either. Despite a complete lack of medical support for his request, KXAN granted most of Collister's requests, including a private work space, making one of 20 station vehicles available for him, buying him noise canceling headphones, providing extra assistance from the Executive Producer, and others. Collister asked for a baby monitor so his manager could push a button to get Collister's attention when Collister had his headphones on. KXAN granted the request. Collister never provided anything from a healthcare provider or anyone else indicating that the accommodations were not sufficient.

Collister was not meeting deadlines or getting the "whale" stories on the air, most likely because he was spending time making secret recordings and working on his venture with Nexstar's competitor (TEGNA) which owned KXAN's competitor (KVUE). This came to a head in early September 2017 when Collister got "scooped" on several stories and a KXAN photographer became so frustrated with Collister that he did not want to work with Collister anymore. Frustrations of Chad Cross and other KXAN employees are summarized in numerous emails which were admitted into evidence in the arbitration. There was plenty of evidence to find that Collister was being unreasonable and no testimony is needed from KXAN's counsel.

The undisputed evidence before the arbitrator was that Collister put forth short-lived efforts to fulfill the requirements of a Performance Improvement Plan and ultimately refused to commit to important deadlines. The Arbitrator heard testimony that Collister was seen packing up his personal belongings, saying he would go across the street to KVUE and "kick the

s_ _ t out of KXAN.” The Arbitrator had multiple emails laying out Collister’s business plan for his competing business as evidence as to why he refused to commit to deadlines for Super Bowl and Olympics stories – he wanted to leave KXAN and wanted out of his non-compete agreement, so he could go to KVUE. So, the Arbitrator had before her exactly what the quote from the illegal recording refers to – performance issues that were not connected to ADHD and Collister being unreasonable. There is no need for testimony from an attorney.

III.

ARGUMENTS MADE BY ATTORNEYS ARE NOT EVIDENCE

Regardless of whether the alleged quote in Exhibit 43 (which was admitted) or the illegal recording came into evidence, this has nothing to do with the review by this Court following the standard of review allowed by the Federal Arbitration Act. As can be seen from Exhibit 43, KXAN had counsel engaged prior to Collister’s discharge. Collister did as well. In fact, Collister quoted his counsel in Exhibit 43, where he also put in bold red and underlined type:

“The following statement has been crafted with my attorney Mark Anthony Sanches, who will be representing me at the EEOC and in Arbitration hearings:

Chad,

You’re intentions to fire me because of my disclosure of my disability are incredibly transparent and you continue to discrimination and retaliation. Your outright lies, mischaracterizations and falsehoods will eventually be proven false and I will be vindicated once you, and others, are deposed under oath and I present my side of the events. As for your excessively forceful demand that I commit in blood to meeting the deadliens above, my attorney has advised me to respond as follows:

“I will do my best to hustle to meet the deadlines. But as with every investigative story, I am not responsible – nor can I control – the level of cooperation I will encounter from those who are the subject of these stories which may cuase delays beyond my control.”

Collister wanted in evidence what he wrote in Exhibit 43 about his attorney’s opinion, and the Arbitrator admitted it. The bottom line is that the Arbitrator had before her what

both KXAN's attorney allegedly said and what Collister's attorney allegedly said. It was within the Arbitrator's discretion whether or not to give comments from lawyers any weight. As can be seen from the Award, she did not give them any weight and instead focused on the credible evidence. Revisiting what lawyers said is beyond the permissible scope of review in this case.

IV. **CONCLUSION**

No amount of additional discovery or testimony from attorneys could save Collister's claim. The credible evidence presented at the arbitration hearing proved that Collister had no claim. His bizarre behavior during the hearing such as chewing on a fishing lure and going to the back of the conference room and sleeping during testimony had to have hurt his credibility. Although Defendant's counsel could testify as to his opinions as to why Collister's claim had no merit, none of those opinions fit within the statutory grounds for vacating an arbitrator's award. Collister has failed to articulate how testimony from counsel relates to any of those grounds.

Respectfully submitted,

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